

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 2006-0886-FH
2006-0890-FH

VS.

JAMES RICHARDS O'CONNELL,

Defendant.

OPINION AND ORDER

Defendant filed a motion to quash. Following a preliminary hearing at the 42d District Court, Hon. Paul A. Cassidy presiding, defendant was bound over to stand trial on two counts of Breaking and Entering a building with intent, prohibited by MCL 750.110, habitual offender, fourth notice.

Applicable Law

The primary function of the preliminary examination is to determine whether a crime has been committed, and, if so, whether there is probable cause to believe that the defendant committed it. *People v Hamblin*, 224 Mich App 87, 92; 568 NW2d 339 (1997). If, at the conclusion of the preliminary examination the magistrate determines that probable cause exists to believe that a felony has been committed and that the defendant committed it, the magistrate must bind the defendant over for trial in the circuit court. MCL 766.13. Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged. *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982).



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A magistrate's determination at the preliminary examination should not be disturbed unless a clear abuse of discretion is demonstrated. *Id.* The trial court is not to substitute its judgment for that of the magistrate unless the evidence is totally wanting on a material point. *People v Hoag*, 89 Mich App 611, 617; 281 NW2d 137 (1979). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

The conflicts in the evidence must be resolved by the trier of fact, not the magistrate. *People v Stone*, 463 Mich 558, 567; 621 NW2d 702 (2001). Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. *People v Cooper*, 461 Mich 912; 604 NW2d 66(1999).

Findings of Magistrate

According to the transcripts of the preliminary exam held February 27, 2006, the first witness to testify was Neale Hicks, an employee of Dolly's Pizza, in Chesterfield Township. On or about January 27th, 2006, just before closing time of 11:00 p.m., Mr. Hicks was preparing to leave at 10:45 p.m. Mr. Hicks testified that as he walked out the front door he saw two men wearing black sweatshirts with hoods, looking inside an adjacent store, Kimmie K's Hair Salon. Mr. Hicks testified that one of the men had the hood pulled up over his head. Mr. Hicks returned to Dolly's to report what he saw, as he did not want to leave his manager alone under such suspicious circumstances. Unfortunately, it was too dark for Mr. Hicks to get a good look at the men, even though as he again left Dolly's, he noticed one of them "peeking" around a corner at him. Mr. Hicks then pulled his car around to the Meijer Gas Station, and could still see the men standing at the side of the building. Mr. Hicks testified that he then saw the two men, together,

approach the doors of the hair salon, and saw one of them break the lock, open the door, and then they both stepped in. Mr. Hicks testified that then while one was inside, the other exited, he believed, to act as a lookout. Mr. Hicks testified that he also saw the two together breaking the lock on the store next to the hair salon, Vacuum World, and one went inside while the other stayed outside. At about that time, the police arrived, the man who was outside was apprehended by the police, but the man on the inside apparently exited via the back door, where the police also apprehended him.

On cross-examination, Mr. Hicks testified that when he left Dolly's and first saw the two suspects, he saw their faces, eye to eye, as he was about six feet away from them. He then went back into Dolly's and locked the door behind him. It was approximately 10 minutes before he and the manager left the store through the front door. Mr. Hicks then got into his truck that had been parked right in front of the store, and waited until the manager got safely to his own truck at the back of the front parking lot. When they were leaving, Mr. Hicks saw one of the suspects peeking around the corner at him. He stated he could see both men around the side of the building, and at that point, he used his cell phone to call the police to report the suspicious activity, then drove over to the Meijer Gas Station, in front of the strip mall. It is from that vantage point that he saw the police activity already described above.

The next witness, Kim Melton, is the owner of the hair salon. She testified that she closed and locked the salon about 8 o'clock that night. Following the incident, it is noted that the perpetrators had taken all the change from the cash register, approximately \$10, as well as the framed dollar on the wall.

Witness Joseph Belkowski, the owner of Vacuum World, testified next. He testified that on the subject date, he had closed and locked his store at about 7 p.m. He had left about 50 to 60 dollars in the store prior to leaving; it was gone when he next arrived.

Police Officer Chris Delor of Chesterfield Township also testified. He stated that he had ordered the suspect outside of the store to the ground, where he apprehended him. He identified in court defendant O'Connell as that person. Officer Delor was aware that his partner had also apprehended co-defendant Reese. Officer Delor testified that upon search of defendant O'Connell's person, he found no tools for breaking locks, no change or bills taken from the business, but he did have a can of beer with him.

After hearing all the testimony, the court then ordered the defendant bound over on the basis that it was a question of fact for a jury, based on the circumstantial evidence presented. "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause." The evidence satisfies "the 'probable cause' standard when, 'by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged.'" *People v. Greene* 255 Mich App 426, 444; 661 NW2d 616 (2003).

Accordingly, pursuant to the prevalent case law as set forth above, the Court finds no abuse of discretion in the lower court's bindover. For this reason, defendant's motion to quash is DENIED. Trial is scheduled for June 27, 2006. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

DATED: June 20, 2006



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

cc: Denise Hart, Assistant Prosecuting Attorney

Karen L. Lemke, Attorney at Law